Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID A. SHALLER, M.D.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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93 pp

QUESTION PRESENTED

Congress *found* [Appendix F. 58a-60a]:

(1) Plaintiff was fired in retaliation for whistleblowing.

(2) The Department of Veterans Affairs' (DVA) policy is to "harass and/or fire whistleblowers."

(3) ". . . that in light of the failure of the DVA quality assurance system to prevent and correct poor medical treatment, the Department's punishment of personnel who attempt to expose poor quality care closes out the last possible mechanism within the hospital system to address problems."

Concurrent with the DVA's policy are rising malpractice and malpractice claims paid. [footnote #8 p. 9, #13 p 12]

Congress provided physicians with statutory judicial review, 38 U.S.C. § 7462(f)(1), because of the DVA's policy. *The courts nullified Congress' intent and the law.* By judicial legerdemain, the courts *unlawfully* dismissed Plaintiff's case, finding "no subject matter jurisdiction". There was no adjudication on merit.

Will The Supreme Court respect Congress' intent and the law by exercising its supervisory authority, and *permit Plaintiff judicial review per referenced statute*, to correct the agency's manifest violation of public policy and the miscarriage of justice to Plaintiff?

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OPINIONS BELOW

The District Court found joint subject matter jurisdiction with the U.S. Court of Federal Claims, but lacked jurisdiction for Tucker claims more than $10,000.00. It found no merit to defendant's issue of *res judicata* and failure to state a claim. (p. 52a, footnote #6). Feb. 26, 1997. [Appendix E, 49a-57a]

The District Court and both parties Stipulated transfer "in its entirety" to the U.S. Court of Claims, pursuant to 28 U.S.C. § 1491(a). The Tucker Act. June 6, 1997. [Appendix D, 47a-48a]

Unpublished Decision by the U.S. Court of Federal Claims dismissed for lack of subject matter jurisdiction June 28, 2002. [Appendix C, 12a-46a].

The United States Court of Appeals for the Federal Circuit affirmed. February 5, 2003. [Appendix B, 3a-11a]

Combined Petitions for rehearing and rehearing en banc were denied. April 15, 2003. [Appendix A, 1a-2a]

JURISDICTION

The Court of Appeals Order was entered on April 15, 2003.

The jurisdiction of District Court was invoked under 38 U.S.C. § *et seq*, ["relevant Department of Veterans Affairs (DVA) employment regulations as set forth in the United States Code and internal DVA procedures including. . ."] grievance procedure § 4110 was repealed, recodified under § 7461 *et seq*. (see footnote #5, Appendix p. 52a), judicial review now under § 7462(f)(1) (see footnote #8, Appendix p. 52a), with pay statutes § 7404, § 7431-33, § 7438, the Administrative Procedures Act, 5 U.S.C. § 701 *et seq*., 28 U.S.C. § 1346(a)(2) [Little Tucker Act].

The District Court Stipulation transferred the case "in its entirety" to the United States Court of Claims [pursuant to] and invoked 28 U.S.C. § 1491(a) [the Tucker Act] and invoked the above.

The jurisdiction of the U.S. Court of Federal Claims was invoked under the above and found "Plaintiff Presents a Cognizable Back Pay Act Claim", 5 U.S.C. § 5596(b) [Appendix p. 38a].

The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. 1295(a)(3).

The jurisdiction of This Court was invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. § 1491 (a)(1) provides in pertinent part:

> "The United States C'aims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . As we explained in *United States v Testan*, 424 U.S. 392,398 (1976), the Tucker Act created jurisdiction in the Court of Claims to consider certain claims against the United States whenever a substantive right existed. The Back Pay Act supplies the substantive right to recover backpay whenever an employee is affected by an unjustified or unwarranted personnel action which leads to the withdrawal or reduction of pay and allowances. (Verbatim from *United States v Fausto*, 484 U.S. 439 (1988).

The Back Pay Act, 5 U.S.C. § 5596(b), provides in pertinent part:

> "An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—" (A) is entitled on correction of the personnel action, to receive for the period for which the personnel action was in effect—[an amount equal to back pay (less any amount earned through other employment) and reasonable attorney fees]." (Verbatim from *United States v Fausto*, 484 U.S. 439 (1988).

38 U.S.C. *et seq.*, Department of Veterans Affairs Health-Care Personnel Act of 1991. [Amends Title 38 U.S.C.]: Public Law 102-40. May 7, 1991. Provides in pertinent part:

> 38 U.S.C. § 7461 *et seq.* Disciplinary and grievance procedures: Adverse actions:
>
> 38 U.S.C. § 7461(2) Defines "Major" Adverse Actions:
>
> (A) Suspension.
>
> (B) Transfer.
>
> (C) Reduction in grade.
>
> (D) Reduction in basic pay.
>
> (E) Discharge.

38 U.S.C. § 7462 provides judicial review for "Major" adverse actions:

> 38 U.S.C. § 7462(f)(1) A section 7401 employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.
>
> 38 U.S.C. § 7462(2)(A)(B)(C) In any case in which judicial review is sought under this sub-section, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion, found to be—
>
> (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) Obtained without procedures required by law, rule or regulation having been followed; or
>
> (C) Unsupported by substantial evidence.

38 U.S.C. "Money-mandating" statutes are under:

> 38 U.S.C. § 7404. Grades and pay scales.
>
> 38 U.S.C. § 7431-33 and § 7438. Special pay authority.

38 U.S.C. Relevant Department Of Veterans Affairs Regulations:

> MP-1, Part I, Chapter 2, VA Investigation Policy; the Inspector General Act of 1978: Department of Medicine and Surgery's Administration Letter, IL 13-82-8, SUBJ: Administrative Investigations; MP-1, Part I, Chapter 15, Office of Inspector General Complaint Center; Department of Medicine and Surgery's Security guide for Conducting Administrative Investigations, dated August 20, 1988, Section 1.450-1.455 of Title 38, Code of Federal Regulations; and of the Department policies for Disciplinary Actions, Grievances and Hearings, MP-5, Part II.

The Administrative Procedures Act 5 U.S.C. § 701 *et seq.* provides in pertinent part:

> 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

The Privacy Act 5 U.S.C. § 552a.(b)(8) and (b)(9) permit disclosure as provided in pertinent part:

> (b)(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual:

(b)(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee:

STATEMENT OF THE CASE

Plaintiff, a physician was fired by the Department of Veterans Affairs (DVA) in retaliation for whistleblowing.[1] He seeks judicial review and filed a claim for reinstatement and back pay pursuant to the Tucker Act, 28 U.S.C. § 1491, Back Pay Act, 5 U.S.C. § 5596, Department of Veterans Affairs Health-Care Personnel Act of 1991, 38 U.S.C. § *et seq.*, [grievance procedure under § 7461; judicial review under § 7462(f)(1) and (2)(A)(B)(C): "money-mandating" statutes under section § 7404 (Grades and pay scales), section § 7431-33 and § 7438 (Special pay authority)], the Administrative Procedures Act, 5 U.S.C. § 701 *et. seq.*, and as a Matter of Public Policy. The case was dismissed for lack of jurisdiction.

BACKGROUND

On December 7, 1983, Plaintiff began employment at the Veterans Hospital in Wilkes-Barre, Pennsylvania, as Chief of the Rheumatology Section. One year later, in addition to Rheumatology Chief, he was appointed Chief Physician of the Hospital's Nursing Home Care Unit (NHCU).

In 1988, the DVA instituted monetary incentives for hospital administrators to improve efficiency. Shortly thereafter, administrators began intervening in patient care with disastrous results, patients were harmed and died. Plaintiff did not permit this to happen to his patients,[2] and

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[1] U.S. Congress House Report 102-1062. November 9, 1992. Findings: "The DVA discourages the reporting of poor quality care by harassing whistleblowers or firing them." [Appendix-II: The U.S. Court of Appeals For The Federal Circuit]. (Appendix-F, 58a-60a)

[2] An administrator arranged the transfer of a paralyzed ventilator dependent patient to the Nursing Home Care Unit (NHCU), without

complained vigorously. A letter of complaint to the Office of Inspector General (OIG) dated December 30, 1988 caused his firing on January 17, 1991.

* * * *

Plaintiff's firing in retaliation for whistleblowing is a *finding of fact*[1] established by the U.S. Congress after a thorough investigation culminating in public hearings on November 20 and 21, 1991. The hearings compelled sworn testimony from the DVA's Secretary, Inspector General and Medical Director, and all failed to refute Plaintiff's sworn testimony.[3]

Plaintiff reported mismanagement, negligence, and malpractice including deaths to appropriate DVA officials, who engaged in a cover-up. He then reported to the OIG, which failed to investigate.

In one letter to the OIG, Plaintiff evidenced individual veterans who were mistreated and inadvertently released patient identifying data. Upon learning of Plaintiff's actions, the patients or surviving widows willingly consented to Plaintiff's release, and expressed their gratitude to Plaintiff for taking their case to Washington, DC for the sole purpose of providing them proper medical care.

Plaintiff's knowledge or approval. The patient came from the acute pulmonary ward, tethered to the ventilator. Transferring a patient from an acute ward demonstrates "efficiency", because care "costs less" in the NHCU. However, the NHCU nurses were not trained in ventilators and respiratory therapy services were not available in the NHCU. Plaintiff learned of the transfer shortly after its completion. When attempts to reverse it were unsuccessful, he was compelled to call Headquarters in Washington, DC. The patient survived and was transferred back within the hour. Other patients not subject to Plaintiff's oversight were not so fortunate and died. Substantial tort claims were paid.

[3] Plaintiff's sworn testimony and relevant parts of HR 102-1062 were evidenced in Appendix II before the U.S. Court Of Appeals For The Federal Circuit.

Contrary to the lower Court's claim, the letter was *not* sent to private parties, but to government officials in the belief they could assist in the plight of the mistreated veterans.[4]

Copies sent to Ambassador Bruce Laingen, Executive Director of a congressional commission and Paul W. Schafer, M.D., a DVA physician were deemed a "violation" of the Privacy Act, notwithstanding that congressional commissions are exempt from the Act,[5] and VA physicians routinely review patient records for the sole purpose of providing medical care without first obtaining consent.

The DVA claimed it fired Plaintiff because he violated the Privacy Act in this instance, although Plaintiff's release was inadvertent, caused no harm, subsequent consent was obtained, and two fact finding reviews found "no violation." [1, 6] The letter actually benefited some veterans, for others it was too late.

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[4] Recipients were (1) Plaintiff's Congressman (2) Office of The Special Counsel of U.S. Merit Systems Protection Board (3) Chief, DVA Medical Director (4) Paul W. Schafer, M.D., Director, National Association of VA Physicians (who was also a VA physician) and (5) Ambassador Bruce Laingen, Executive Director, National Commission on the Public Service. Chartered by Congress, this commission was also known as the Volcker Commission. (Paul Volcker, former Chairman Federal Reserve).

[5] The Privacy Act 5 U.S.C. § 552a.(b)(8) and (b)(9) permit disclosure:

> "(b)(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual:
>
> (b)(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee:"

[6] The Pennsylvania Unemployment Compensation Board of Review, January 10, 1992. Appendix-II: The U.S. Court of Appeals For The Federal Circuit.

Prior to firing Plaintiff, the DVA launched a campaign of harassment, hoping he would quit. He was subject to an OIG investigation of bogus "sexual misconduct" charges, wherein the official record was altered.[7] The tape tampering was confirmed by the FBI. He was reassigned duties routinely performed by registered nurses and prohibited from treating rheumatology patients. This resulted in neglect and mistreatment of arthritis patients with tragic results.[8] Subsequently, the DVA was compelled to hire an outside Rheumatologist at additional tax-payer expense. He was reassigned duty to rewrite renewals for expired prescriptions. He was suddenly given a "low-satisfactory" Proficiency Report (1988), despite

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[7] Plaintiff submitted multiple complaints with detailed documentation to the OIG, which never investigated. Subsequently, the OIG initiated an investigation of "rumors" of Plaintiff's sexual misconduct. This "investigation" altered sworn testimony (tapes, transcripts), subsequently confirmed by the FBI's tape analysis. Employees involved in this "investigation" were promoted!

[8] Arthritis patients were treated by non-rheumatologists resulting in misdiagnosis, malpractice and death. In the case of Robert Adams, when Plaintiff was prohibited from continuing his treatment, his rheumatoid arthritis was misdiagnosed as cancer. His death was attributed to the chemotherapy given for cancer he didn't have. His case was reviewed by University of Pennsylvania Faculty:

> "Dr. . . . of the University of Pennsylvania's medical school staff wrote in her review, "I believe there are multiple levels of negligence involved here. First, [the patient] should have been evaluated by a rheumatologist . . . to fully understand his [lymph-node condition]." Shaller however, was too busy updating expired prescriptions to be able to see any patients. Had his services been available, the veteran would have undoubtedly been properly disgnosed and thus spared severe pain and suffering." [From Veteran Magazine Vol. 12, No. 5/6. May/June 1992. Appendix II. U.S. Court of Appeals for the Federal Circuit].

The case was filed in U.S. District Court, Middle District of Pennsylvania; 3:91 cv 01553, *Adams et al v. U.S.A.* His widow received a substantial settlement.

sworn testimony from his supervisor of his "excellent" care, and after all prior years of "outstanding" evaluations. Subsequently, the DVA failed to issue yearly Proficiency Reports although they are required by its regulations. Requests for educational and annual leave were denied. The DVA falsified Plaintiff's W-2 statements. The IRS confirmed the erroneous W-2's and obtained Plaintiff's salary information from the VA's credit union where Plaintiff was paid by direct deposit. Plaintiff's mail was tampered with. The Postal Inspector: "This does reflect possible harassment on the part of the VA" and noted the futility of pursuing the matter; "Since my complaint is with a government agency, they (the United States Attorney) would be in a unique position of both prosecuting and defending the agency."

The DVA proposed to fire Plaintiff for the aforementioned letter. It convened a disciplinary board and held disciplinary hearings, contravening applicable regulations.[9] One veteran stated that his suffering caused "enough pain to take suicide" and provided compelling testimony supporting Plaintiff's actions. After that, no further testimony from identified veterans or surviving widows was permitted. Signed statements from the involved veterans or surviving widows were not allowed into evidence. The DVA stated that "due process did not apply", notwithstanding the applicable regulations that they do apply.[9]

The DVA did concede the letter caused no harm to veterans but claimed it caused "irreparable harm to the VA".

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[9] MP-1, Part I, Chapter 2, VA Investigation Policy; the Inspector General Act of 1978: Department of Medicine and Surgery's Administration Letter, IL 13-82-8, SUBJ: Administrative Investigations; MP-1, Part I, Chapter 15, Office of Inspector General Complaint Center; Department of Medicine and Surgery's Security guide for Conducting Administrative Investigations, dated August 20, 1988, Section 1.450-1.455 of Title 38, Code of Federal Regulations; and of the Department policies for Disciplinary Actions, Grievances and Hearings, MP-5, Part II.

The VA further determined that Plaintiff had to be fired because he was "*not rehabilitatible*"![10]

REASONS FOR GRANTING THE PETITION

(1) TO CORRECT A MANIFEST VIOLATION OF PUBLIC POLICY.

(2) JUSTICE REQUIRES ADJUDICATION BASED ON MERIT.

(3) TO PROVIDE SUPERVISORY AUTHORITY AND CORRECT THE MISCARRIAGE OF JUSTICE ENDURED BY PLAINTIFF.

Despite Congress' finding that Plaintiff was fired in retaliation for whistleblowing and current statutes explicitly providing judicial review,[11] the U.S. Court Of Federal Claims

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[10] Plaintiff is board certified in three specialties; Internal Medicine, Rheumatology, and Geriatric Medicine. He is an honors graduate; BS Chemistry, University of Maryland, and MD, University of Maryland School of Medicine. Postgraduate education; Cleveland Metro General Hospital-Case Western Reserve University, University of California, San Francisco-Fresno Medical Center, Scripps Clinic and Research Foundation (NIH Fellowship) and Stanford Medical School (Rheumatology).

[11] 38 U.S.C. § 7462 provides judicial review for "Major" adverse actions:

> "(f)(1) A section 7401 employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision."
>
> "(2)(A)(B)(C) In any case in which judicial review is sought under this sub-section, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion, found to be—
>
> (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) Obtained without procedures required by law, rule or regulation having been followed; or
>
> (C) Unsupported by substantial evidence."

and the U.S. Court of Appeals For The Federal Circuit "failed" to find jurisdiction and dismissed Plaintiff's case.

Granting this writ will allow Plaintiff judicial review and relief of his wrongful firing. The Courts improperly excluded Plaintiff and failed to comply with Congress' intent.

(4) THIS MATTER AFFECTS HEALTH CARE AT VETERANS HOSPITALS NATIONWIDE where Plaintiff's case teaches a lesson.[12] The lesson learned is to remain indifferent to mismanagement, negligence and malpractice.[13] The concurrent rise in VA malpractice is a matter of record. While this matter binds only Plaintiff, the outcome has implications for current and prospective federal professionals who "do what's right" and then are fired.

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[12] Plaintiff's case received national media coverage including; syndicated columnist Jack Anderson (The Washington Post. May 14, 1990), newspaper editorials, magazines and television. Interest persists. [Appendix II. U.S. Court Of Appeals For The Federal Circuit]

[13] Plaintiff's case and Congress' findings have had a chilling effect on otherwise ethical physicians, who have been deterred from coming forward to challenge the DVA's practices. The public record from U.S. District Court serving the Wilkes-Barre VA Hospital, reveals millions of dollars in paid claims. The non-public paid "administrative" claims are similarly large.

Nationwide, VA malpractice and malpractice claims paid continues to increase:

> "From fiscal year 1990 to fiscal year 1994, malpractice claims against VAMC's have steadily increased from 678 to 978 with payments made to claimants totalling over $200 million dollars." (The U.S. General Accounting Office. December 21, 1995. GAO/HEHS-96-24)
>
> "The study shows that in 1997 there was a higher mortality rate among VA patients after a heart attack at 30 days, one year, two years, and three years. The same was true in 1998 and 1999 for the points for which there was follow-up data. . ." (U.S. Medicine. Vol. 39 No. 5. May, 2003.)

Congress lamented:[14]

> ". . . that, in light of the failure of the DVA quality assurance system to prevent and correct poor medical treatment, the Department's punishment of personnel who attempt to expose poor quality care closes out the last possible mechanism within the hospital system to address problems. Unless the DVA changes its policies and procedures, *the poor quality of care* provided to veterans will remain known only to those who provide it."

Congress' investigation produced incontrovertible evidence that the true operational policy of DVA is "to harass and/or fire whistleblowers".[15] Congress is *the* "appropriate authority" to judge this manifest violation of public policy. Clearly then, as a personnel matter, Plaintiff was "affected by an unjustified or unwarranted personnel action".

Plaintiff filed for judicial review and relief. U.S. District Court found joint subject matter jurisdiction with the U.S. Court of Federal Claims but lacked jurisdiction for Plaintiff's Tucker claims over $10,000.00.[16]

To avoid separate proceedings, the case was transferred "in its entirety".[17] Without a hearing or testimony, the US Court of Federal Claims dismissed in a 28 page Unpublished Decision finding "no subject matter jurisdiction".[18] It refused to transfer back to District Court for erroneous reasons.[19] The

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[14] *Id.* at 1. Emphasis added. p. 60a.

[15] *Id.* at 1.

[16] The District Court Decision. Appendix E, 49a-57a.

[17] The Stipulation To Transfer. Appendix D, 47a-48a.

[18] Claims Court Unpublished Decision Appendix C, 12a-46a.

[19] The Court recklessly misrepresented Plaintiff's prior litigation in District Court. Plaintiff was successful in several instances; obtaining a restraining order, request for documents, etc. The Court record speaks for itself. Defendant's motion for *res judicata* was denied, evidencing that Plaintiff's instant matter for judicial review is new.

U.S. Court of Appeals For The Federal Circuit affirmed.[20] Plaintiff's petitions for rehearing and rehearing en banc were denied.[21]

* * * *

The U.S. Court of Federal Claims was silent on Congress' finding that Plaintiff was fired in retaliation for whistle-blowing, which is a "prohibited personnel practice", and a manifest violation of public policy. Most disturbing, The U.S. Court of Appeals For the Federal Circuit spurned Congress' findings as mere "allegation".[22] Also, the Courts' refused to recognize The Pennsylvania Unemployment Compensation Board of Review as an "appropriate authority" in personnel disputes, having authority to order an employer (including the U.S. government) to pay benefits. Federal Courts accept their findings as dispositive.[23]

The Unemployment Board found: "Plaintiff [Claimant] did not intentionally violate regulations or any laws", thus successfully refuting the DVA's "reason" Plaintiff was fired.[24] Since Plaintiff was fired for something the Finders Of Fact determined he did not do, clearly his firing was "unjustified". Further, the DVA was ordered and paid Plaintiff's unemployment benefits. The Courts refused to recognize that the DVA's payment of unemployment benefits in these circumstances conclusively proves Plaintiff's firing was "unjustified".

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[20] Decision of Court of Appeals. Appendix B, 3a-11a.

[21] Petitions Denied. Appendix A, 1a-2a.

[22] *Id.* at 20. *See* p. 11a.

[23] "State and Federal Courts in Pennsylvania addressing this issue have held that the facts found during unemployment compensation proceedings may have a preclusive effect when: the issue before the Court is identical to the one raised in the subsequent litigation. . ." (Pennsylvania Employment Law Letter, April 1995).

[24] *Id.* at 6.

The Congress and The Pennsylvania Unemployment Board are both "appropriate authorities". Their Findings of Fact conclusively prove that Plaintiff was "affected by an unjustified or unwarranted personnel action". This is sufficient to trigger the Back Pay Act [25] and jurisdiction in the U.S. Court of Federal Claims under the Tucker Act,[26] for employees not excluded by *Fausto*.[27]

The U.S. Court of Federal Claims did find "Plaintiff Presents a Cognizable Back Pay Act Claim",[28] but "failed" to find jurisdiction. Plaintiff's ("money-mandating") pay statutes are under 38 U.S.C. § 7404; grades and pay scales and §§ 7431-33 and 7438; special pay authority.

The Courts' "failure" to find jurisdiction derives from its faulty analysis. As shown below, (1) it refused to apply the plain language of the relevant judicial review statute, instead, it "created" its' own *Simple Logical Extension*; (2) it failed to follow the correct legal standard and use "current law"; (3) it wrongly used *Fausto* to exclude Plaintiff because he is statutorily provided judicial review and is not under CSRA;

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[25] The Back Pay Act, 5 U.S.C. § 5596(b).

[26] The Tucker Act, 26 U.S.C. § 1491(a)(1).

[27] *United States v Fausto*, 484 US 439 (1988).

> "The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act." 484 U.S. at 455."

Fausto controls only employees under CSRA. *Khan* held that VA physicians such as Plaintiff appointed under 38 U.S.C. § 4104(1) are not covered by CSRA. Also, Plaintiff has statutorily defined judicial review; 38 U.S.C. § 7462 (f)(1). Therefore, *Fausto* does not exclude Plaintiff from Claims Court jurisdiction.

[28] *Id.* at 18. *See* 38a.

and (4) it ignored *Worthington* [29] which held that the U.S. Court of Federal Claims has jurisdiction for claims not under CSRA, which otherwise fall within the jurisdictional grant of the Tucker Act. (5) Finally, it failed to respect Congress' findings, declaring them mere "allegation".

The analysis begins with the *Khan* precedent: [30, 31]

> "Dr. Khan was a VA physician, who like Dr. Shaller, was appointed under 38 U.S.C. § 4104(1) and who, like Dr. Shaller, filed a claim against the agency for back pay and reinstatement. *Khan* 201 F.3d at 1379. This Court held that the Civil Service Reform Act ("CSRA") does not apply to physicians appointed under section 4101(1). *Id.* at 1381-82. We further held that as such a physician, Dr. Khan had an exclusive grievance procedure under 38 U.S.C. § 7463."

Relying on *Fausto* and with § 7463 absent judicial review, The US Court of Appeals For The Federal Circuit held that Dr. Khan was precluded from The US Court Of Federal Claims.

Plaintiff [Dr. Shaller] is statutorily under § 7462 [32] *unlike* Dr. Khan. *Khan* holds that Plaintiff has an exclusive grievance procedure under 38 U.S.C. § 7462! The critical difference here is that § 7462 *Explicitly* provides judicial review. But, instead of properly following *Khan* by using

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[29] *Worthington v United States*, 168 F.3d 24 (Fed. Cir. 1999).

[30] *Id.* at 20. *See* 9a.

[31] *Khan v United States*, 201 F.3d 1375 (Fed. Cir. 2000).

[32] Grievance procedures are defined in 38 USC § 7461 and depend on the adverse action: "Major adverse actions" are under § 7462 and "Other adverse actions" under § 7463.

Section § 7461(2)(E) defines "Discharge" as a "Major adverse action"; therefore subject to the grievance procedures in § 7462. Section § 7462(f)(1) provides for judicial review.

Section § 7463 does not provide for judicial review.

the plain language of the relevant judicial review statute, The Court skillfully transformed it by "creative extension":[33]

> ". . . the Federal Circuit finally held that 38 U.S.C. § 7463 (the provision which applied to Dr. Khan) created an exclusive remedy for section 7401(1) personnel. Clearly, by the *Most Simple Logical Extension*, the same holds true for 38 U.S.C. § 7462, as well as its predecessor, 38. U.S.C. § 4110."

The Court's wizardry *Converted* Dr. Khan's remedy into Plaintiff's remedy, ignoring the fact that Plaintiff's remedy in § 7462 provides judicial review. The Court then *Applied* Dr. Khan's remedy in § 7463 to Plaintiff, and precluded The Court's jurisdiction.

Plaintiff was wrongly excluded from the U.S. Court of Claims by this judicial legerdemain. The relevant controlling legal authority that provides Plaintiff judicial review: 38 U.S.C. § 7462(f)(1) was ignored.

The U.S. Court of Federal Claims was wrong because: (1) The Court must use the plain language of the relevant judicial review statute. It cannot "create" its' own by *Logical Extension*. (2) *Fausto* does not preclude Plaintiff from Claims Court jurisdiction because he is not under CSRA and he is statutorily provided judicial review.

The US Court Of Appeals For The Federal Circuit defended the U.S. Court Of Federal Claims by revealing it was not really using the "current" statutory construction of § 7462(f)(1) but its predecessor, § 4110 because:[34]

> ". . . The events giving rise to plaintiff's claims occurred between March 1988 and January 1991, prior to Congress' amendment and recodification of 38 U.S.C.

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[33] *Emphasis added. Id.* at 18. *See* 43a..

[34] *Id.* at 20. *See* footnote #1, 9a and footnote #2, 10a.

> § 4110. To that end, the Court of Federal Claims applied the prior version of 38 USC § 4110."[35]

This is impermissible because it violates the correct legal standard to use "current law". This Supreme Court's precedent still reigns: [36]

> "The court held that an appellate court confronted with a change in the law "must apply the law in effect at the time it renders its decision," whether the change was constitutional, statutory, or judicial."

The U.S. Court of Appeals For The Federal Circuit's precedent:[37]

> "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice, or there is statutory direction or legislative history to the contrary."

In jurisdictional matters, as the case here, This Supreme Court held in Landgraf:[38]

> "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed . . . Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case". . . *PRESENT LAW NORMALLY GOVERNS* in such situations because jurisdictional statutes "speak to the power of the Court rather than to the rights or obligations or the parties. . ."

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[35] The prior version of 38 U.S.C. § 4110 did not preclude jurisdiction in Claims Court. It was repealed and replaced with 38 U.S.C. § 7461 *et seq.*; "Disciplinary and Grievance Procedires." Public Law 102-40. Department of Veterans Affairs Health-Care Personnel Act of 1991 (May 7, 1991).

[36] *Thorpe v Durham Housing Authority*, 393 US 268 (1969).

[37] *Forshey v Principi*, 284 F.3d 1335 (Fed. Cir. 2002) (*en banc*).

[38] *Emphasis added. Landgraf v USI Film Prod.*, 511 US 244 (1994).

* * * *

Independent of the foregoing, Plaintiff has jurisdiction in the U.S. Court of Federal Claims. Recall, The Court found Plaintiff presented a Cognizable Back Pay Act Claim, and *Khan* held he is not under CSRA. In these circumstances, jurisdiction is controlled by *Worthington*:[39]

> "because his claim is not within the coverage of the CSRA and because it otherwise falls within the jurisdictional grant of the Tucker Act, The Court of Federal Claims has jurisdiction to adjudicate this dispute."

Here, The Court ignored its' own applicable precedent.

* * * *

CONCLUSION

I. SUMMARY OF THE KEY LEGAL POINTS DEMONSTRATING JURISDICTION IN THE U.S. COURT OF FEDERAL CLAIMS

1. The U.S. Congress and The Pennsylvania Unemployment Board are "appropriate authorities".

(a) Congress *found* Plaintiff was fired in retaliation for whistleblowing.

(b) The Pennsylvania Unemployment Board *found* "Claimant did not intentionally violate regulations or any laws." The DVA was *ordered* and *paid* unemployment benefits.

Therefore, Plaintiff's firing was "an unjustified personnel action" determined by "appropriate authorities".

2. The U.S. Court of Claims *found* Plaintiff presented a "Cognizable Back Pay Act Claim". The Back Pay Act is the substantive right required for jurisdiction in the U.S. Court of Federal Claims under the Tucker Act for employees not

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[39] *Id.* at 29.

excluded by *Fausto*. Plaintiff's ("money-mandating") pay statutes are under 38 U.S.C. § 7404; grades and pay scales and § 7431-33 and 7438; special pay authority.

3. Plaintiff is not excluded by *Fausto*. (controls only employees under CSRA).

(a) *Khan* held VA physicians such as Plaintiff are not under CSRA.

(b) Plaintiff is provided judicial review by statute: 38 U.S.C. 7462(f) (1).

4. The Court must use the plain language of the relevant statute, and cannot create its' own "*Logical Extension*", via judicial legerdemain.

5. The Courts must adhere to the correct legal standard and use "current law".

6. In matters of jurisdiction, as the case here, This Supreme Court's decision in Landgraf held "*PRESENT LAW NORMALLY GOVERNS*".

7. Independently, and consistent with the above, *Worthington* held The Court of Federal Claims has jurisdiction for claims not under CSRA but otherwise within the jurisdictional grant of the Tucker Act.

The analysis demonstrates that Plaintiff *HAS* jurisdiction in the U.S. Court of Federal Claims if the matter is accorded proper jurisprudence.

II. THE GOVERNMENT CODE OF ETHICS AND A MATTER OF PUBLIC POLICY

It is illegal under 5 U.S.C. 2302 to take a personnel action that violates any law implementing or directly concerning merit system principles. Two are relevant here (1) Lloyd-Lafollette Act, 5 USC § 7211, and (2) the Code of

Ethics for Government Service, 5 USC § 7301. The Lloyd-Lafollette Act provides:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a Committee or Member thereof, may not be interfered with or denied.

The Code of Ethics begins:

> Any person in government should: I. Put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department.

Congressional testimony revealed: [40]

> "DVA whistleblowers consistently are condemned for demonstrating a greater loyalty to veterans than to the Department of Veterans Affairs."

Whistleblowing and whistleblower protection are significant public concerns, shown by the selection of TIME Magazine's "2002 Persons of the Year—The Whistleblowers",[41] and The Sarbanes-Oxley Act of 2002. Investigation of corporate scandals revealed that employees feared "career suicide" if they came forward.[42] The public concern is valid, because indifference to improper conduct contributed to huge financial losses and a new era of distrust.

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[40] Testimony of Thomas Devine, Esq. Legal Director, Government Accountability Project. Washington, DC. before the House Government Operations Subcommitee on Human Resources and Intergovernmental Relations. November 20, 1991.

[41] TIME Magazine. Special Double Issue. December 30, 2002/January 6, 2003.

[42] Business Week. December 16, 2002. pg. 107-110.

The government's public policy codifies reprisals against whistleblowers [43] as a "prohibited personnel practice" in the CSRA of 1978 and The Whistleblower Protection Act of 1989.

> "Peer review and reporting through the chain of command does not always work. In these cases public denunciation or whistle-blowing must still be part of the armament of professional ethics. The obligation to blow the whistle, when all else has failed, is grounded in two simple ideas:
>
> First, those who remain silent consent.
>
> Second, the inaction of good people is the main reason why bad people continue to harm others." [44]

III. IN THE INTEREST OF SUBSTANTIAL JUSTICE

Congress spoke on Plaintiff's case. It found as a factual matter that he was fired in retaliation for whistleblowing and the DVA's policy is "to harass and/or fire whistleblowers". This alone is sufficient evidence his firing was "unjustified" and represents a manifest violation of public policy.

Plaintiff's actions were medically necessary in view of the DVA's malpractice, and mandated by the ethical principles of the medical profession and the government's own code of ethics. *Plaintiff's medical judgment and the Facts provided in his sworn congressional testimony were never disputed.*

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[43] Whistleblowing is defined under 5 U.S.C. § 2302(b)(8) as

> "any disclosure of information by an employee which the employee reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, . . . (or for reasons of national security/foreign affairs)."

[44] Health Care Ethics Principles and Problems. Thomas M. Garrett, Harold W. Ballie, Rosellen M. Garrett. Prentice Hall. 1989.

Congress provided VA physicians with a judicial review statute; 38 U.S.C. § 7462(f)(1), because of the DVA's "deplorable" treatment of physicians who speak out. The Courts never "found" this judicial review statute applied to Plaintiff.

Indifference contributes to the DVA's increasing malpractice. Granting this writ should improve medical care at VA hospitals by demonstrating that physicians who "do what's right" and are fired, are permitted the statutorily provided judicial review in Claims Court for reinstatement and back pay.

Plaintiff was fired because he wrote a letter of complaint to the OIG. The identified veterans or surviving widows applauded his action, but the DVA was embarrassed and fired him.

The Court's "failure" to find jurisdiction stems from its flawed analysis. The correct analysis finds jurisdiction in Claims Court pursuant to the Tucker Act, Back Pay Act, and the appropriate judicial review statute, in view of Congress' determination that Plaintiff's firing was "unjustified."

Dismissing this case is contrary to the Supreme Court's precedent.[45]

> The court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Plaintiff has established jurisdiction in District Court for injunctive and declaratory relief with monetary relief up to $10,000.00. Plaintiff *relied* on the District Court's finding of "joint subject matter jurisdiction" with the Court of Federal

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[45] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Claims. Therefore, dismissal is unjust, and if there is truly no jurisdiction in the Court of Federal Claims, than *justice requires* transfer back to District Court to afford Plaintiff limited relief.

Dismissal nullifies Congress' intent and the law. The courts failed to follow proper jurisprudence. The courts failed to adjudicate on merit. To date, the courts have failed to serve the public interest.

The tax-payer (payer of the malpractice claims) and more importantly veterans (victims of malpractice) are best served when VA physicians properly practice medicine without retaliation. The DVA's mission is to serve America's veterans, not itself. This Supreme Court must exercise its supervisory power and grant this writ of certiorari because it is in the public interest with a special interest for veterans, and to correct the miscarriage of justice endured by Plaintiff, and because it is in the interest of substantial justice.

Respectfully submitted,

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